

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52

COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION

The Entertainment Software Association (“ESA”) submits these comments in response to the FCC’s October 22, 2009 Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding. The ESA is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the Internet.

The emergence and widespread consumer adoption of broadband Internet are among the most important technological and cultural developments to impact the video game industry within the past decade. Broadband Internet has helped spawn new game genres, launched new distribution models, and forever changed the face of home entertainment. In May 2009, online game sites attracted more than 87 million U.S. visitors.¹ Most of today’s popular game titles include Internet-enabled features. All three current-generation home console systems connect to the Internet, as do the current generation of handheld gaming devices, enabling consumers to participate in an online community that spans the globe. Digital distribution of game content through legitimate channels is growing at a healthy clip.

¹ Tom Ivan, *Online Gaming Sees Significant U.S. Growth*, Edge Online (June 13, 2009), <http://www.edge-online.com/news/online-gaming-sees-significant-us-growth>.

Moreover, the Internet has changed the way people play games. Broadband connectivity has enabled cooperative game play on a massive scale. It has also given rise to powerful new tools, embedded in many games, that empower users to create and share add-on content with other users in a safe environment. Online games and game services rely upon real-time communication to create exciting and seamless entertainment experiences.² For all these reasons, the ESA has a strong interest in Internet policies that affect the ability of our member-publishers to deliver a quality end-user experience to their customers.

The ESA expresses no position here on the question of whether net neutrality principles are appropriate or necessary. Instead, we confine our comments to three points:

(1) ***FCC's Proposed Definition of "Reasonable Network Management."*** We support the FCC's efforts to address anti-piracy concerns through appropriate language in the proposed rule and related commentary. In particular, we support defining "reasonable network management" in a way that explicitly permits broadband Internet access service providers (hereinafter, "broadband ISPs") to prevent the unlawful transfer of content.

(2) ***Entities Subject to Net Neutrality Principles.*** The FCC should reject calls to extend the application of net neutrality principles beyond broadband ISPs and should clarify that content, application, and service providers are not among the entities subject to the NPRM's net neutrality principles.

(3) ***FCC's Proposed Modification to Second Net Neutrality Principle.*** We commend the FCC's desire to formulate all the principles in a way that do not provide a safe haven for unlawful

² Whatever policies emerge from this NPRM, we hope that they will allow latency-sensitive applications, such as online games, to thrive on the Internet. (NPRM ¶ 137)

activities. However, we encourage the FCC to clarify that the second principle permits ISPs to prevent both categorically unlawful applications and services and unlawful uses of applications and services.

I. The Definition of “Reasonable Network Management” Should Address the Unlawful Transfer of Content.

The ESA supports the inclusion of language within the NPRM that explicitly permits ISPs to take reasonable steps to curb online infringement of intellectual property rights. There should be no ambiguity on this point. We commend the Commission for acknowledging that “the unlawful distribution of copyrighted works . . . has adverse consequences on the economy” and that “it appears reasonable for a broadband Internet access service provider to refuse to transmit copyrighted material if the transfer of that material would violate applicable laws.” (NPRM ¶ 139) Online piracy has plagued the entertainment software industry. For example, an analysis of global P2P piracy of only thirteen game titles across two major P2P networks during December 2008 found over six million infringing downloads of just those titles,³ including a substantial amount within the United States. We support defining “reasonable network management” in a manner that permits ISPs to “prevent the unlawful transfer of content.” (NPRM ¶ 135)

II. The FCC Should Not Extend Net Neutrality Principles to Reach Entities Beyond Broadband ISPs.

In reframing and expanding upon the original *Internet Policy Statement*, the FCC has proposed that the net neutrality principles “would apply to all forms of broadband Internet access service, regardless over which technology platform they are provided.” (NPRM ¶¶ 100, 154) The FCC has proposed to define “broadband Internet access service” as “[a]ny communication service by wire or

³ IIPA’s 2009 Special 301 Report on Copyright Protection and Enforcement (Feb. 17, 2009), Cover letter to U.S. Trade Representative at p. 5, <http://www.iipa.com/rbc/2009/2009SPEC301COVERLETTER.pdf>.

radio that provides broadband Internet access directly to the public, or to such classes of users as to be effectively available directly to the public.” (NPRM ¶ 55) It has proposed to define the Internet as “the system of interconnected networks that use the Internet Protocol for communication with resources or endpoints (including computers, web servers, hosts, or other devices) that are reachable, directly or through a proxy, via a globally unique Internet address assigned by the Internet Assigned Numbers Authority.” (NPRM ¶ 48 n. 103) The agency has invited commentary on its “approach for defining the scope of entities covered by [its] proposals, including ways to make clear who is and is not subject to these rules.” (NPRM ¶ 55) It has solicited comment on whether the net neutrality principles should apply to “other entities,” such as content, application, and service providers. (NPRM ¶ 101)

The FCC should not extend the network neutrality principles to content, application, and service providers. As the FCC has stated, its rules are intended to “address users’ ability to *access* the Internet and are not intended to regulate the Internet itself.” (NPRM ¶ 14, emphasis in original) The NPRM is firmly rooted in the original *Internet Policy Statement*, which the FCC clearly targeted to issues surrounding broadband Internet access.⁴ More fundamentally, extending the scope of this proceeding to reach content, application, and service providers could have significant and adverse unintended consequences. Evaluating the ripple effect would be a daunting task, given that the NPRM does not adopt a specific definition of “content, application, and service provider” and notes that “any user of the Internet can be such a provider.” (NPRM ¶ 99) It is also difficult to see how pursuing such a bold expansion of scope would be consistent with the FCC’s stated goal of not intending to “regulate the Internet itself.”

⁴ “[T]he *Internet Policy Statement* was originally drafted ‘to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers.’” (NPRM ¶ 101 at n. 223)

The FCC should decline any invitation to expand the scope of application of the principles. Furthermore, we recommend that the final rule include clarifying language that explicitly excludes content, application, and service providers from the scope of the principles.

III. Unlawful Activities Should Find No Safe Haven within the Net Neutrality Principles.

The FCC has proposed modifying the second principle of the *Internet Policy Statement* by adding the term “lawful” to qualify the types of applications and services that users may run on the network. The stated rationale for this change is that the agency has “no intention of protecting unlawful activities in these rules.” (NPRM ¶ 96) Moreover, as the FCC has noted, this revision would harmonize the second principle with the first and third. (Id.)

We support the FCC’s desire to protect against unlawful activities. However, the second principle could benefit from further refinement. Most Internet applications and services are capable of being used for both lawful and unlawful purposes. Based upon the FCC’s commentary, it is clear that the Commission’s intent is that the rules afford no protection for “unlawful activities” (i.e., uses). Nevertheless, the current wording of the second principle is susceptible to the erroneous interpretation that ISPs may *only* prevent consumers from using categorically unlawful applications or services on their networks. We think the rule should be interpreted more broadly. It should not only permit ISPs to prevent categorically unlawful applications or services but also permit them to prevent unlawful *uses* of applications and services. We recommend that the FCC modify the language of the second principle to address both categorically unlawful applications and services and unlawful uses of applications and services. Or, in the alternative, we request that the FCC issue clarifying guidance that the second net neutrality principle permits ISPs to prevent categorically unlawful applications and services as well as unlawful uses of applications and services.

Conclusion

Any rules ultimately adopted in this NPRM have the potential to shape the evolution of the Internet for years to come. The ESA strongly supports the FCC's efforts to address the content community's anti-piracy concerns through appropriate language in the proposed rule and related commentary. However, we encourage the FCC to clarify that the second net neutrality principle permits ISPs to prevent both categorically unlawful applications and services and unlawful uses of applications and services. We do not support expanding the net neutrality principles beyond broadband ISPs.

Respectfully submitted,

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